

Self-determination, the *Chagos Advisory Opinion* and the Chagossians

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Abstract

In its *Chagos Advisory Opinion*, the International Court of Justice (ICJ) ruled that the UK's detachment of the Chagos Archipelago from the colony of Mauritius on the eve of independence constituted a violation of customary international law (CIL). This article analyses the Court's approach to establishing the emergence and content of the right to self-determination in this frustrated case of decolonization. It goes on to examine the argument that self-determination's peremptory character has decisive consequences in this specific context – a contention which found favour with several judges in their Separate Opinions. The article explores the extent to which the claims and counterclaims, made during the advisory proceedings, turned on countervailing readings of not only the key sources of custom but also of the principle of inter-temporal law. The final sections consider the significance of the *Chagos Opinion* for the Chagossians, both in relation to the Archipelago's resettlement and for their outstanding appeal in the UK courts (where the European Convention on Human Rights performs a pivotal role).

Key words: Self-determination; customary international law, decolonization, *jus cogens*, European Convention on Human Rights.

1. Introduction

In its *Chagos Advisory Opinion*,¹ the International Court of Justice (ICJ) found that the detachment of the Chagos Archipelago from Mauritius before it acceded to independence constituted a violation of customary international law (CIL). In arriving at this conclusion, the Court offered a thorough re-evaluation of the status and content of right to self-determination and its relationship with the norms governing territoriality in the context of decolonization. In particular, it established how, and when, self-determination became a CIL rule as well as confirming the manner in which this entitlement could be exercised. Further, in their Separate Opinions, several judges

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¹ Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965 (Advisory Opinion) 25 February 2019 <<https://www.icj-cij.org/en/case/169/advisory-opinions>> accessed 10 November 2019

endorsed the claim – advanced by a number of the participants in the advisory proceedings – that self-determination had become a peremptory norm of international law in the critical period. This article assesses the resonance of these arguments and findings for the jurisprudence of self-determination and for the related norms which evolved to protect the territorial integrity of colonial units and newly independent States. It, therefore, concentrates on substantive aspects concerning the emergence and content of the CIL relating to self-determination, rather than the procedural issues raised by the case.² In a companion article, Robert McCorquodale Jennifer Robinson and Nicola Peart examine the significance of the *Chagos Opinion* for instances of decolonization which threatened to disrupt the territorial integrity of established colonial units and the role that consent plays in such cases. The present contribution also assesses the Opinion's resonance for the Chagossians as it is not entirely clear how the rights and interests of this deracinated community will be protected in the event of the Archipelago's resettlement. The article then turns to consider the way in which the *Opinion* can be harnessed for Chagossians' current appeal in the UK courts via the European Convention on Human Rights.

2. Background

It was feared that the UK's planned colonial withdrawal from the Indian Ocean would create a regional power vacuum, which might be filled by the Soviet Union.³ Consequently, a 1964 UK/US survey of the Indian Ocean revealed that Diego Garcia, the principal island in the remote Chagos Archipelago, would make an ideal site for a US military base. This inhabited Archipelago was a distant dependency of the British Non-Self-Governing Territory (NSGT) of Mauritius.⁴ In 1965, the UK government entered into the 'Lancaster House Agreement' with the Mauritian Council of Ministers to detach the Chagos Islands from Mauritius before it acceded to independence.⁵ The historical record shows the UK government applied considerable pressure to procure such 'consent' and that this transaction was intimately connected with the decision to

² The Court ruled, unanimously, that it had jurisdiction to give an Advisory Opinion in accordance with Art 65, UN Charter. It decided that it should not decline to answer the Request (12 votes to 2).

³ See David Vine, *Island of Shame: The Secret History of the US Military Base on Diego Garcia* (2009). Stephen Allen, *The Chagos Islanders and International Law* (2014); and Stephen Allen and Chris Monaghan (eds), *Fifty Years of the British Indian Ocean Territory: Legal Perspectives* (2018).

⁴ Mauritius was listed as a Non-Self-Governing Territory in GA Res 66(I)(1946).

⁵ See *Chagos Advisory Opinion* (n 1) [108-112].

grant Mauritius its independence.⁶ The British Indian Ocean Territory (BIOT) was created in 1965 and the Chagos Islands were separated from Mauritius accordingly.⁷ It was set aside for defence purposes and, in 1966, the UK and US concluded a treaty regarding the use of Diego Garcia.⁸ Between 1968 and 1973, the Archipelago's permanent inhabitants – the Chagossians – were forcibly removed from the entire Archipelago and/or prohibited from returning pursuant to the construction and operation of the planned US military facility.⁹ Through the 1965 'Agreement', the UK government undertook, *inter alia*, to return the Chagos Archipelago to Mauritius once it was no longer required for defence purposes.

Since 1980s, the Mauritian government has demanded the return of the Archipelago on the ground that the Mauritian colonial government's consent to the 1965 'Agreement' was vitiated by duress.¹⁰ In 2010, it instituted proceedings, under the UN Convention on the Law of the Sea, in response to the UK's declaration of a vast Marine Protected Area (MPA) around the Chagos Archipelago.¹¹ Mauritius asserted its sovereignty claim in this case but the Tribunal ruled it lacked the jurisdiction to adjudicate this contention.¹² Nevertheless, Judges Kateka and Wolfrum found that the right of self-determination had entered into custom by the time of the Archipelago's excision from Mauritius; and they were receptive to Mauritius' duress argument, too.¹³ In its Award, the Tribunal decided that the MPA's creation had violated several of the Convention's provisions.¹⁴ It found the material undertakings, contained in the 1965 'Agreement', were legally binding and gave Mauritius a stake in certain decisions about the Archipelago's future.¹⁵ But when subsequent bilateral discussions came to nothing Mauritius decided to take the matter to the General Assembly.

⁶ *ibid* [100-107].

⁷ BIOT Order in Council (1965) SI 1965/1920.

⁸ 'Exchange of Notes between the UK and US Governments concerning the Availability for Defence Purposes of the British Indian Ocean Territory', 30 Dec 1966, UKTS No 15 (1967) Cmnd 3231.

⁹ Most were transported to Mauritius although some were taken to Seychelles. This prohibition was implemented through the 1971 BIOT Immigration Ordinance.

¹⁰ See the 'Report of the Select Committee on the Excision of the Chagos Archipelago (No 2/1983)' (Mauritian Legislative Assembly).

¹¹ (1982) 1833 UNTS 39.

¹² Chagos Marine Protected Area (Mauritius v UK), Award (Annex VII LOSC Tribunal, Perm Ct. Arb 2015).

¹³ See their Concurring and Dissenting Opinion, *ibid*, [70-79].

¹⁴ Arts 2(3), 56(2), and 194(4), Award (n 12) [547]. The MPA remains in force as a matter of UK law. See *R (Bancoult No 3) v Secretary of State for Foreign and Commonwealth Affairs* (2018) UKSC 3.

¹⁵ Award (n 12), [535, 539-540, and 544].

Mauritius drafted and tabled the Request for an Advisory Opinion, which was sponsored by the Group of African States. It was adopted by the General Assembly, without amendment.¹⁶ In essence, the Request asked the following two questions: was the decolonization of Mauritius completed when it gained independence in 1968, after the excision of the Chagos Archipelago? If not, what were the legal consequences flowing from the UK's continued administration of the Archipelago? In order to answer the Request, the Court would need to decide how, and when, the right to self-determination crystallized as a matter of CIL. If such a norm had emerged before 1965, the UK would under an obligation to maintain Mauritius' territorial integrity, pending the exercise of this right. However, if the right to self-determination acquired customary status after Mauritius had acceded to independence, the UK would have had the authority to partition the Mauritian colonial unit in 1965 (or 1968, at the latest) as a matter of international law.

3. The Right to Self-determination and Customary International Law

3.1. Self-determination and the UN Charter

Article 1(2) of the UN Charter proclaimed the principle of self-determination and the equality of peoples to be one of the purposes of the United Nations. Further, Article 73 recognised the 'sacred trust' imposed on administering States to ensure that the interests and well-being of the permanent inhabitants of NSGTs were of paramount concern. It also declared that it was incumbent on these States to develop the institutions of such Territories so as to bring about the progressive realization of self-government.¹⁷ However, the exact relationship between Articles 1(2) and 73 was not entirely clear at this point and the extent to which these provisions demonstrated the existence of a legal right to self-determination remained uncertain during the UN's early years.¹⁸

3.2. The Significance of the Colonial Declaration

¹⁶ GA Res 71/292, 22 June 2017.

¹⁷ To this end, Art 73(e) required all administering States to report to the UN Secretary General on the conditions prevailing in their NSGTs. The General Assembly was quick to assume the responsibility for monitoring developments in these Territories: see Allen, (n 3), 139-156.

¹⁸ However, the Court had no difficulty in finding the strong connections between these provisions and the subsequent the emergence of the right to self-determination. See Opinion, (n 1) [147].

Mauritius' core argument was that the right to self-determination had achieved CIL status with the adoption of General Assembly resolution 1514 (XV)(1960) – the 'Declaration on the Granting of Independence to Colonial Countries and Peoples'.¹⁹ This Declaration asserted, *inter alia*, that: alien subjugation, exploitation and domination constitutes a denial of fundamental human rights (paragraph 1); all peoples have the right to self-determination (paragraph 2); no fetters can be placed on the exercise of that right in relation to the achievement of independence (paragraph 5); and the disruption of the territory integrity of a 'country' is incompatible with the UN Charter (paragraph 6). Mauritius carefully traced the way in which this entitlement had evolved, throughout the 1950s, via the General Assembly's work concerning decolonization,²⁰ and its involvement in the drafting of the International Covenants on Human Rights.²¹ Moreover, it drew attention to the fact that General Assembly had applied the Colonial Declaration to the Mauritian context via resolution 2066(XX)(1965), which was adopted a few weeks after the Archipelago's excision from Mauritius. In sharp contrast, the UK argued that the right of self-determination had not crystallized as a CIL norm by the critical date. Specifically, it denied that resolution 1514 generated any binding legal obligations as far as Mauritius' decolonization was concerned.²² Both the UK and the US contended that the right of self-determination only acquired CIL status with the adoption of General Assembly resolution 2625(XXV)(1970)) – i.e. after Mauritius had become independent.²³

General Assembly resolutions do not create international law *per se* as, formally, they only amount to institutional recommendations.²⁴ But while the colonial powers have always been reluctant to interpret General Assembly resolutions as having some kind of quasi-legislative authority,²⁵ it is well-established that such

¹⁹ Transcript, 3 September 2018, AM, CR 2018/20, 45-47.

²⁰ See Mauritius' Written Statement, 1 March 2018, 187-228. The key resolutions included: 421(V)(1950); 545 (VI)(1952); 637A (VII)(1952); 738 (VIII)(1953); 837 (IX)(1954); 1188 (XII)(1957); and the Report of the Third Committee on the Draft International Covenants on Human Rights (1955) A/3077.

²¹ The International Covenants on Human Rights were endorsed in GA Res 2200A (XXI)(1966).

²² Transcript, 3 September 2018, PM, CR 2018/21, 48.

²³ *ibid*, 45. The Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States provided: 'By virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development [...]'.
²⁴ Art 13, UN Charter.

²⁵ See, eg, Huw Thirlway, *The Sources of International Law* (2014) 79–81; David Harris and Sandesh Sivakumaran, *Cases and Materials on International Law* (8th edn, 2015) 54. But see Brian Lepard (ed), *Re-examining Customary International Law* (2017).

resolutions may contribute to CIL's development by providing evidence of *opinio juris* in certain circumstances.²⁶ Concomitant State practice would also be needed for a new CIL norm to emerge, however. During the period in question, the requisite standard was that such practice had to be extensive and virtually uniform.²⁷ However, although, *prima facie*, the Colonial Declaration's provisions had a mandatory character, where was the necessary State practice in support of a customary right to self-determination? In this context, it could be argued that discrete instances of decolonization involved the exercise of the right to self-determination by peoples, rather than States, notwithstanding the fact that these events proved the existence of a corresponding duty to facilitate the exercise this entitlement on the part of administering States. It is clear that this technical obstacle could be overcome by the claim that State activity in connection with the adoption of General Assembly resolutions may qualify as State practice, in appropriate cases.²⁸ However, this approach does not address the issue of the correct threshold for establishing when the right to self-determination crystallized as CIL norm. Was the new position expressed in resolution 1514, which was passed by 89 votes with none against and 9 abstentions (largely the colonial powers) – or did this only happen with the passing of resolution 2625, which was adopted by consensus in 1970?

3.3. Self-determination and the Principle of Inter-Temporal Law

The claims and counterclaims made during the advisory proceedings would appear to turn on different readings of the principle of inter-temporal law. The principle is often associated with disputes about title to territory, but it underpins international legality and the rule of law more generally. Its first element holds that actions must be judged by reference to the law in force at the time they were carried out while the second component requires States to conduct themselves in ways that keep pace with legal

²⁶ See the Nuclear Weapons Advisory Opinion (1996), ICJ Rep 226, [70].

²⁷ North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark and Netherlands) (1969) ICJ Rep 3, [77].

²⁸ Conclusion 6(2) of the International Law Commission's (ILC) Draft Conclusions on the Identification of Customary International Law (2018) provides that State practice may take the form of 'conduct in connection with resolutions adopted by an international organization', A/73/10. The accompanying Commentary acknowledges that 'such practice contributes to the formation, or expression, of [CIL] rules' [7]. This position was also taken by the International Law Association in its 'Statement of Principles Applicable to the Formation of General Customary International Law', (2000), 19.

developments as far as their (unfulfilled) international obligations are concerned.²⁹ As noted above, the UK claimed that the detachment of the Chagos Islands from the Mauritius did not breach contemporaneous international law. The US also maintained this position arguing that, if the Court chose to answer the Request, the normative standing of the right to self-determination would have to be assessed by recourse to international law as it stood in 1965-1968 rather than by reference to doctrinal developments occurring in the intervening period.³⁰ Mauritius argued that, in any event, the UK's actions breached the applicable law of the time and, to this end, it claimed the idea that colonial 'territories were simply given away out of a sense of *noblesse oblige*, unfettered by any legal obligation [was] both condescending to the peoples who gained their independence in that period, and legally untenable'.³¹ During the mid-1960s different perspectives certainly existed as to whether self-determination constituted a CIL norm (or not),³² but which view held sway at the critical date?

For modern international lawyers, it may be almost inconceivable that the process of decolonization did not result from anything other than the rights and obligations forged by international law during the 1950s and 60s. For example, James Crawford submitted, as Counsel for Mauritius, in the *Chagos MPA Case* that:

'It's impossible to look back to the 1960s and view what was happening as anything but the achievement of independence on the basis of the exercise of the legal right categorically affirmed by the General Assembly in 1960.'³³

But, from a broader perspective, it is worth asking whether decolonization progressed in response to the existence of a legal right to self-determination or was this entitlement actually a product of that process?³⁴ Clearly, the customary right must have emerged at some point during the process of decolonization but if the decisive moment was

²⁹ See Judge Huber's treatment of this principle in the *Island of Palmas Case (Netherlands/USA)* (1928) 2 RIAA 829, 845.

³⁰ Transcript, 5 September 2018, AM, CR 2018/24, 14.

³¹ Transcript, 3 September 2018, AM, CR 2018/20, 47.

³² See Allen, *The Chagos Islanders and International Law* (n 3), 176-197.

³³ Quoted in Mauritius' Written Statement, 1 March 2018, 211. But see James Crawford, 'The General Assembly, the International Court and Self-determination' in Vaughan Lowe and Malgosia Fitzmaurice (eds), *Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert Jennings* (1996) 585.

³⁴ James Summers, 'Decolonisation Revisited and the Obligation Not to Divide a Non-Self-Governing Territory', (2018) 55 *Questions in International Law* 147, 156-7.

reached in 1970 with the adoption of resolution 2625, it would follow that the right only acquired its binding quality just when that process was coming to an end.³⁵

A number of participants argued that self-determination had achieved the status of *jus cogens* by 1965.³⁶ Cyprus, however, contended that the temporal dimension of the case was largely irrelevant since the UK's failure to complete Mauritius' decolonization meant that its outstanding obligation was subject to normative developments which had occurred in the ensuing years.³⁷ In this respect, Cyprus showed that the second element of the principle of inter-temporal law had profound implications for the advisory proceedings because even pre-existing treaty norms would be overtaken by emergence of new *jus cogens*.³⁸ This observation is particularly acute in the context of the Chagos Archipelago given the 1966 UK/US Agreement concerning the use of Diego Garcia for defence purposes.

In any event, the act of interpretation alone would have a significant impact on the way in which the key sources were understood during the advisory proceedings. The UK and US's insistence that the Court should approach the case as though it was conducting the proceedings in 1968 assumes that even if the pivotal General Assembly resolutions had been adopted by then, any interpretation of international law would have to be consistent with the way in which the material international legal doctrines were understood by judges and international lawyers practising at that time.³⁹ There is no way of knowing for sure that the ICJ would have answered the first question posed in the Request in the negative, if the case had been heard back in 1968. We only have to look at its 1966 decision in the *South-West Africa Case* to be reminded that such an outcome would not have been a foregone conclusion.⁴⁰ There is no way back to that time – a time when certain voices were heard and others were not – but we cannot lose sight of the fact that those involved in the advisory proceedings in 2018 would, inevitably, be interpreting the relevant rules and principles

³⁵ Mauritius' argument in Chagos MPA Case, cited by Guatemala, Transcript, 5 September 2018, AM, CR 2018/24, 35.

³⁶ See eg South Africa, Transcript, 4 September 2018, AM, CR 2018/22, 14. Mauritius proclaimed self-determination's peremptory character. However, it did not allege that this status had been attained by 1965-68: Written Statement, 1 March 2018, 211.

³⁷ Transcript, 4 September 2018, PM, CR 2018/23, 55-57.

³⁸ *ibid.* See Arts 53 and 64, Vienna Convention on the Law of Treaties (1969).

³⁹ See Ingo Venzke, *How Interpretation Makes International Law: On Semantic Change and Normative Twists* (2012); and Andrea Bianchi, Daniel Peat and Matthew Windsor (eds), *Interpretation in International Law* (2015).

⁴⁰ *South West Africa (Ethiopia v South Africa and Liberia v South Africa)(Second Phase)(1966)* ICJ Rep 6.

of international law in the light of progressive developments, which have occurred over the last fifty years.

In relation to the Assembly's second question – what are the consequences of detachment for the UK's ongoing administration of the Chagos Islands? – Mauritius argued that the UK's excision of the Chagos Islands from the Mauritius amounts to a continuing breach of international law and it bears responsibility for its internationally wrongful acts.⁴¹ Consequently, it claimed that the right result would be for the Archipelago to be returned immediately (or at least within six months).⁴² Nonetheless, Mauritius was careful not to set out the full ramifications of this question. It would follow that, if the UK's responsibility was triggered in 1965, when the BIOT was founded, the extent of the UK's wrongdoing would be considerable, and, in contentious proceedings, it would certainly give rise to a hefty claim for reparations. However, Mauritius held back on this potential claim, perhaps to avoid the possibility that the dispute might be characterized as a bilateral one otherwise.⁴³

3.4. Uti Possidetis Juris and Title to Territory

One of the main difficulties for Mauritius flowed from its claim that the advisory proceedings were about enabling the General Assembly to satisfy its mandate to bring about the end of decolonization in a specific context. As a result, Mauritius had to avoid any arguments that would create the impression that this was really a bilateral dispute about territorial sovereignty. Consequently, it chose to argue that the case had nothing to do with title to territory.⁴⁴ It is notable that Mauritius invoked the principle of *uti possidetis juris* in pleadings in the *Chagos MPA Case*.⁴⁵ However, in its Written Statement in the advisory proceedings, it argued that colonial units were protected by the right of self-determination via an associated entitlement to territorial integrity.⁴⁶ And, by the time of the oral proceedings, it had further clarified its position and was

⁴¹ Transcript, 3 September 2018, AM, CR 2018/20, p 65. See Art 14 of the ILC's Articles on Responsibility of States for Internationally Wrongful Acts (2001) (ARSIWA).

⁴² Transcript, *ibid*, 63.

⁴³ However, a number of participants in the proceedings raised the issue of reparations and see the Separate Opinions of Judges Trindade and Sebutinde.

⁴⁴ Transcript, 3 September 2018 AM, CR 2018/20, 78 and 80.

⁴⁵ Mauritius' 2012 Memorial in the Chagos MPA Case, 108-109. According to Shaw, the customary principle of *uti possidetis juris* creates a strong presumption that, 'new States will come to independence with the same boundaries they had when they were administrative units within the territory or territories of a colonial power': Malcolm Shaw, 'The Heritage of States: The Principle of *Uti Possidetis Juris* Today', (1996) 67 British Yearbook of International Law 75, 97.

⁴⁶ Mauritius' Written Statement, 1 March 2018, 216-219.

arguing that a right to territorial integrity was a corollary of the right to self-determination.⁴⁷ Mauritius' claim that the issue of self-determination could be separated from the question of title to territory is hard to understand, at least at first glance. At one level, the exercise of the right to external self-determination always has territorial consequences. However, Mauritius' way around this difficulty was to argue that any apparent bilateral dispute concerning territorial sovereignty was located in a broader frame of reference – decolonization – a process in which the General Assembly has performed a leading role.⁴⁸ It reasoned that once the process of decolonization has been completed, by the return of the Chagos Islands, no dispute would remain outstanding.⁴⁹

As far as the principle of *uti possidetis juris* is concerned, in the *Frontier Dispute (Burkina Faso/Mali) Case*, the ICJ observed that:

'[...] International law – and consequently the principle of *uti possidetis* – applies to the new State (as a State) not with retroactive effect, but immediately and from that moment onwards. It applies to the State as it is, i.e., to the 'photograph' of the territorial situation then existing. The principle of *uti possidetis* freezes the territorial title; it stops the clock, but does not put back the hands [...]'⁵⁰

This standpoint led the UK to argue that it was only the exact moment of independence that mattered for the purpose of decolonization and, consequently, a colonial power was entitled to alter the territorial parameters of the colonial unit at any time prior to the achievement of independence.⁵¹ The UK's argument overlooked one of the main justifications for adopting this principle in relation to Africa's decolonization – the perceived need to maintain international stability and to obviate 'fratricidal struggles' during the process of decolonization by discouraging irredentist claims.⁵² Accordingly, it could not be construed as a momentary phenomenon. Moreover, in the light of its core purpose, the principle could not be used to support the idea that administering powers would be competent to dismember their colonial territories on the eve of

⁴⁷ A construction that was consistent with the one advanced by Belize in this case. See Transcript, 4 September 2018, AM, CR 2018/23, 23. Also see Belize's Written Statement, 30 January 2018, 20-29.

⁴⁸ For discussion of this concept see Western Sahara Advisory Opinion (1975) ICJ Rep 12, [32-33].

⁴⁹ See Mauritius' Written Comments, 18 May 2018, 38-39. This view was echoed by the African Union, Transcript, 6 September 2018, PM, CR 2018/27, 19.

⁵⁰ Frontier Dispute (Burkina Faso/Mali) Case (1986) ICJ Rep 566, [30].

⁵¹ Transcript, 3 September 2018, PM, CR 2018/21, 42.

⁵² Frontier Dispute Case, (n 50), [20].

independence, particularly where such a step would involve the creation of a new colony.

4. The Chagos Advisory Opinion

In its Advisory Opinion, the ICJ ruled that the adoption of resolution 1514 was: ‘a defining moment in the consolidation of State practice on decolonization’, and, thus, in the evolution of the customary right to self-determination.⁵³ The Court saw the Declaration as the catalyst for the acceleration of the process of decolonization in the years immediately following its adoption. As far as the *opinio juris* requirement was concerned, the ICJ was convinced that, both in terms of its content and the circumstances of its adoption, resolution 1514 had ‘a declaratory character with regard to self-determination as a customary norm’, which was reflected in its key provisions.⁵⁴ The Court also arrived at the conclusion that the subject of the right to self-determination – the ‘people’ concerned – was to be defined by reference to a NSGT as a *whole* and the customary right to territorial integrity was the corollary of the wider entitlement to self-determination, by virtue of paragraph 6 of the Colonial Declaration.⁵⁵ Invoking the formulation it had articulated in the *Western Sahara Case*, the Court observed that, after 1960, the partitioning of such a Territory would violate the right to self-determination, ‘unless it is based on the freely expressed and genuine will of the people of the territory concerned’.⁵⁶ Further, it observed that a high level of scrutiny was required for the purpose of assessing whether consent had actually been given.⁵⁷ Applying this test to the circumstances surrounding the negotiation of the 1965 ‘Agreement’, the ICJ found that, under the 1964 Mauritian constitution, the elected Mauritian representatives did not possess the authority to agree to the Archipelago’s detachment.⁵⁸ In effect, the Court held that consent could only have been obtained through a referendum held before the decision was made. It, therefore, reached the conclusion that Mauritius’ decolonization had not been lawfully completed in 1968.⁵⁹

⁵³ Chagos Opinion (n 1), [150].

⁵⁴ Opinion, [152-3].

⁵⁵ Opinion, [160].

⁵⁶ Opinion, [150-153]. See the *Western Sahara Opinion* (n 48), [59].

⁵⁷ Chagos Opinion (n 1), [172].

⁵⁸ *ibid.* This conclusion was based on the Committee of Twenty-Four’s assessment that real power remained with the UK government during this period: Opinion, [99].

⁵⁹ Opinion, [174].

The issues of territorial integrity and consent are analysed further in the following article by Robert McCorquodale Jennifer Robinson and Nicola Peart.

In response to the Request's second question, the Court decided that the UK's continuing administration of the Chagos Islands constituted an international wrongful act for which it bears responsibility.⁶⁰ The jurisprudence of self-determination reasserted itself at this point as the ICJ reaffirmed its view that self-determination manifests an *erga omnes* character.⁶¹ To this end, it chose to invoke resolution 2625, which declared that all States are under a duty to co-operate with the UN regarding the realization of the right to self-determination.⁶² However, the Opinion stopped short of holding that self-determination has attained the status of *jus cogens*. Beyond calling on the UK to withdraw from the Archipelago as rapidly as possible, the ICJ left the modalities for the completion of Mauritius' decolonization to the General Assembly.⁶³

The Court relied virtually exclusively on CIL in its Advisory Opinion. However, given the numerous submissions in the advisory proceedings about self-determination's peremptory character, how could this apparent status (and the consequences thereof) be ignored? A well-rehearsed argument in this regard is that self-determination does not have the normative clarity required for peremptory status, when compared with norms such as, say, torture or genocide.⁶⁴ However, it could be retorted that a prohibition on the dismemberment of a colonial territory on the eve of the exercise of the right to self-determination without the genuine consent of the people concerned has a high degree of specificity and, thus, it should be capable of qualifying as *jus cogens*.

A number of judges addressed the issue of *jus cogens* in their Separate Opinions. Perhaps the most incisive analysis in this respect was undertaken by Judge Robinson who set out a scheme by which norms could be shown to have acquired peremptory status.⁶⁵ He reasoned that self-determination was a CIL norm *before* 1960 as a result of the General Assembly's activity between 1950 and 1957; that it was

⁶⁰ Opinion, [177] (13 votes to 1).

⁶¹ Opinion, [180]. See the East Timor (Portugal v Australia) Case (1995) ICJ Rep 102, [29].

⁶² GA Res 2625(XXV)(1970).

⁶³ Chagos Opinion (n 1), [178-179].

⁶⁴ See eg Jamie Trinidad, Self-Determination in Disputed Colonial Territories (2018) 13-16.

⁶⁵ Separate Opinion of Judge Robinson, [77]. According to his key criteria a customary norm could graduate to *jus cogens* if it: (a) has been recognised and accepted by States as a whole without the need for a corresponding conventional obligation having been established; (b) has a moral and humanitarian character; (c) protects the fundamental values of the international community; and (d) has universal application.

grounded in the obligation to respect the inherent dignity and worth of the human condition; and he alluded to the widely held belief that the recognition of the right to self-determination is a precursor for the existence of all human rights.⁶⁶ He went on to identify the evidence in support of his view that self-determination had attained peremptory status by the critical date.⁶⁷ For Judge Robinson, the upshot of this analysis was that the 1966 UK/US treaty concerning Diego Garcia violated the terms of Article 53 of the Vienna Convention on the Law of Treaties (VCLT) and, therefore, it must be considered to be null and void.⁶⁸ Moreover, he observed that such a conclusion should trigger a duty of non-recognition on all States, as far as the illegal situation in the Chagos Archipelago is concerned.⁶⁹

Perhaps the Court's reticence on this issue is understandable as the CIL route was one that was at least plausible to all those participating in the proceedings and it was sufficient for the purpose of responding to the Assembly's Request. However, this approach meant that the continued operation of the US military base on Diego Garcia was not held to violate international law.⁷⁰ Surprisingly, during the proceedings, Mauritius gave an undertaking to support the continued operation of the US once the Archipelago was returned.⁷¹ It is not clear how such an undertaking is consistent with its claim that self-determination manifests a peremptory character, especially when taking into account Cyprus' argument on this point. It may be that Mauritius' decision was dictated by pragmatism but as the Chagos debacle was driven by real-politick considerations right from the start, it would be hard to justify this strategy on that basis. Moreover, such a course of action begs the question, how could this small Archipelago be resettled in any meaningful sense with a US military base sprawled across its largest island?⁷²

⁶⁶ *ibid.*

⁶⁷ *ibid.*, [71-73]. This account was assisted by the conclusion that the right to self-determination had entered into custom by 1957, as a result of a series of resolutions which had been adopted between 1950 and 1957, [6-17]: see (n 20).

⁶⁸ *ibid.*, [83 and 88].

⁶⁹ *ibid.*, [89]. This view was also shared by Judge Trindade in his Separate Opinion. See Arts 40 and 41(2), ARSIWA. In any event, States would be under a duty not to knowingly assist the UK in perpetuating its internationally wrongful act via Art 16.

⁷⁰ Judge Tomka observed, in his Separate Opinion, that the Court was silent about this matter, [10].

⁷¹ Transcript, 3 September 2018, AM, CR 2018/20, 70.

⁷² A study, sponsored by the UK government, concluded that resettlement was feasible: see *R (on the Application of Hoareau and Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2019] EWHC 221 (Admin) [36-51]. However, this assessment was based on continued observance of the UK's treaty obligations to the US. Mauritius would not be bound by any such commitments.

5. Self-determination and the Chagossians

5.1. *The Special Position of the Chagossians in the Advisory Proceedings*

The special position of the Chagossians, as far as the advisory proceedings were concerned, is obvious. Mauritius positioned the Chagossians at the heart of its case. This was apparent from the Assembly's second question, which focused on the consequences of the UK's ongoing administration of the Archipelago: 'including with respect to the inability of Mauritius to implement a programme for the resettlement on the Chagos Archipelago of its nationals, in particular those of Chagossian origin'. Further, the moving video testimony of Liseby Elyse, a Chagossian who was removed involuntarily from the Archipelago, was offered as a 'statement of impact'.⁷³ And a number of Chagossian political leaders were members of the Mauritian delegation, including Olivier Bancoult, Chair of the Chagos Refugees Group. Clearly, the UK government's well-documented callous disregard for the Archipelago's permanent inhabitants provides a glimpse of the massive human cost caused by the exiling of the Chagossians from their ancestral homeland. The plight of the Chagossians has remained a mainstay of the Mauritian government's narrative in the aftermath of the Advisory Opinion.⁷⁴ However, it is worth remembering that many Chagossians continue to experience chronic impoverishment in Mauritius and they have largely remained at the bottom of Mauritian society since their arrival on the island all those years ago.⁷⁵

The centrality of the Chagossians' communal experience to Mauritius' case may have prompted a question asked by Judge Gaya at the end of Mauritius' oral submissions on the first morning of the proceedings. He asked: 'In the process of decolonisation relating to the Chagos Archipelago, what is the relevance of the will of the population of Chagossian origin?'. Mauritius responded by saying that the administering Power was required to take the will of the Chagossian population into account 'in determining whether the consent of the people of Mauritius as a whole has been obtained'.⁷⁶ It added that:

⁷³ Counsel for Mauritius, *ibid*, 72.

⁷⁴ In the General Assembly, the Mauritian Prime Minister said the treatment meted out to the Chagossians by the UK 'was akin to a crime against humanity': GA/12146, 22 May 2019.

⁷⁵ See David Vine, 'The Impoverishment of Displacement: Models for Documenting Human Rights Abuses and the People of Diego Garcia' (2006) 13 Human Rights Brief 21.

⁷⁶ Mauritius' Written Reply to Judge Gaya's Question, [5].

‘The withdrawal of the unlawful administration, the recognition of the territorial integrity of Mauritius as including the Chagos Archipelago and the exercise of sovereignty over the totality of its territory by Mauritius, will allow the return to the Chagos Archipelago, and the resettlement there of all individual Chagossians wishing to do so, in accordance with the laws of Mauritius’.⁷⁷

The UK observed that Mauritius had addressed the issue of resettlement only in relation to its own nationals and it pointed out that significant Chagossian communities are located in the Seychelles and the UK.⁷⁸ Mauritius would surely reply that all those of Chagossian origin (and their direct descendants) are, in principle, eligible for Mauritian citizenship. However, such a standpoint would not necessarily satisfy the now sizeable Chagossian diaspora.⁷⁹

In its Advisory Opinion, the Court catalogued the situation of the Chagossians in some detail.⁸⁰ However, it did not want to rule on their human rights. Instead, it noted that:

‘As regards the resettlement on the Chagos Archipelago of Mauritian nationals, including those of Chagossian origin, this is an issue relating to the protection of the human rights of those concerned, which should be addressed by the General Assembly during the completion of the decolonization of Mauritius.’⁸¹

This position is entirely consistent with the statist character of the international legal order; however, given the pivotal role the suffering of the Chagossians played in the narratives weaved by the participants in the advisory proceedings, it was disappointing that the Court declined to provide more guidance on how the human rights of the Chagossians might be protected on the Archipelago’s return to Mauritius.

The UK government’s initial response to the Advisory Opinion has not been positive.⁸² Given that the UK and US hold veto powers in the Security Council, the

⁷⁷ *ibid*, [6].

⁷⁸ The UK’s Comments on the Mauritius’ Written Reply, [5 and 8]. Also see the US’s Comments [4].

⁷⁹ See Laura Jeffery, *Chagos Islanders in Mauritius and the UK* (2011).

⁸⁰ Chagos Opinion (n 1), [113-130].

⁸¹ Opinion, [181].

⁸² See the statement of the Minister of State for Foreign Affairs, House of Commons, 26 February 2019 and the views expressed by the UK’s representative in the General Assembly, 22 May 2019, GA/12146. Also see Thomas Burri, ‘In the Wake of the ICJ’s Opinion in Chagos: Britannia Waives the Rules’, *Völkerrechtsblog*, 9 July 2019: <https://voelkerrechtsblog.org/in-the-wake-of-the-icjs-opinion-in-chagos-britannia-waives-the-rules/>.

General Assembly will have to take the lead in operationalizing the ICJ's findings in this case. Against this background, on 22 May 2019, the General Assembly adopted a resolution welcoming the *Chagos Advisory Opinion* while taking several steps designed to give it effect. For instance, the Assembly demanded, inter alia, that: the UK withdraw its administration within 6 months; the resettlement of the Chagos Archipelago by Mauritian nationals (including those of Chagossian origin) must be addressed urgently; and the UK was urged to co-operate with Mauritius to facilitate this process.⁸³ However, the Assembly chose not to elaborate on the content of the Chagossians' rights vis-à-vis the Archipelago on this occasion, instead it appeared to leave this matter to Mauritius. Whether such a light-touch approach is fully justified remains an open question, especially in the light of Judge Tomka's critical observation that the Chagossians: 'were not represented in – and defended vigorously enough by – the Government of Mauritius [and] they were in fact abandoned by the United Nations, which, after 1968, was not interested in their destiny [...]'.⁸⁴

In their Separate Opinions, Judges Gaja and Abraham contemplated the importance of the will of the Chagossians in the context of Mauritius' decolonization. Specifically, they took the view that the ICJ should have stopped with its finding that Mauritius' decolonization had not been lawfully completed rather than ruling on the final status of the Chagos Islands. Judge Gaja did not share the Court's view that the principle of territorial integrity requires the whole colonial territory to be attributed to a single independent State.⁸⁵ He observed that while the Assembly may wish to reaffirm the view it took back in the 1960s – that the Chagos Islands would become part of Mauritius – he noted that the Assembly possessed a measure of discretion regarding the shape that decolonization took in concrete cases,⁸⁶ and so it should have been left to the Assembly to revisit this issue taking into consideration the freely expressed will of the Chagossians, and their descendants, *today*.⁸⁷ Judge Abraham recognised that different sub-units of the same colony could express different preferences with regard to decolonization. He concluded that, as long as such views were freely expressed, a colonial power would not be violating the principle of territorial integrity if it put in place

⁸³ GA Res 73/295, 22 May 2019. It also called on all States to co-operate with the UN and to refrain from any action that would impede or delay the decolonization of Mauritius. The voting record was 116 in favour and 6 against, with 56 abstentions.

⁸⁴ Judge Tomka, Separate Opinion, [1].

⁸⁵ Judge Gaja, Separate Opinion, [1].

⁸⁶ *Ibid*, [5]. This discretion was acknowledged in the Western Sahara Opinion (n 48), [71].

⁸⁷ Judge Gaja's Separate Opinion, *ibid* [6].

different arrangements for the decolonization of individual sub-units, irrespective of the fact that this approach may give effect to decisions reached by minority populations.⁸⁸ Judge Abraham noted that the Chagossians were not consulted by the UK during the process of detachment; nevertheless, he considered that their views would have been significant at that point regarding the fate of the Chagos Archipelago.⁸⁹

There is considerable anthropological evidence to suggest that the Chagossians possess a societal/cultural identity that separates them from the wider Mauritian people.⁹⁰ In this context, it may be significant that, in *Re Secession of Quebec*, the Canadian Supreme Court observed that the notion of a 'people' is not necessarily co-terminus with the entire population of a given State.⁹¹ Indeed, in that case, the Court observed that a 'people' may include only a portion of the population of an existing State in relation to the exercise of the right to self-determination.⁹² Against this background, it is worth noting that Article 3 of the UN Declaration on the Rights of Indigenous Peoples declares that Indigenous peoples possess the right to self-determination.⁹³ The Chagossians have embraced their status as an Indigenous people and, as a result, their entitlement to an array of Indigenous-specific rights should be recognized in relation to the resettlement of the Chagos Archipelago.⁹⁴ However, the extent to which the Mauritian government will be receptive to any such claim-rights, which arise as a matter of CIL,⁹⁵ remains to be seen.

5.2. The Effect of the Chagos Advisory Opinion on the Bancoult Litigation

⁸⁸ Judge Abraham's Separate Opinion. This analysis may have been prompted by the controversial arrangements devised for Mayotte in the Comoros Archipelago. See Jamie Trinidad, 'Self-Determination and Territorial Integrity in the Chagos Advisory Proceedings: Potential Broader Ramifications' (2018) 55 Questions in International Law 61, 65-67.

⁸⁹ *ibid*, Separate Opinion.

⁹⁰ See Allen, *The Chagos Islanders and International Law* (n 3), 271-282; and Amy Schwebel, 'International Law and Indigenous Peoples' Rights: What Next for the Chagossians', in Allen and Monaghan, *Fifty Years of the British Indian Ocean Territory: Legal Perspectives* (n 3), 319.

⁹¹ [1998] 2 SCR 217.

⁹² *ibid*, [124].

⁹³ GA Res 61/295 (2007). However, the Indigenous specific variant of this entitlement does not give rise to a presumptive right to independent statehood.

⁹⁴ The Mauritian government has objected to the Chagossians' claim of indigeneity saying that they constituted a segment of the wider Mauritian people. See Report of the 17th session of the UN Working Group on Indigenous Populations, 12 August 1999, E/CN4/Sub2/1999/19 [63]. South Africa referred to the Chagossians as an Indigenous people during the advisory proceedings. Transcript, 4 September 2018, PM, CR 2018/22, 13.

⁹⁵ See eg Siegfried Wiessner 'Indigenous Sovereignty: A Reassessment in Light of the UN Declaration on the Rights of Indigenous Peoples' (2008) 41 *Vanderbilt Journal of Transnational Law* 1141; and Matthias Åhrén, *Indigenous Peoples' Status in the International Legal System* (2016).

The significance of the *Chagos Advisory Opinion* for the Chagossians' ongoing litigation in the UK courts has been raised in the context of the outstanding appeal in *R (on the Application of Hoareau and Bancoult) v Secretary of State for Foreign and Commonwealth Affairs*.⁹⁶ These joined cases sought to challenge to the decision, taken in 2016, not to allow the Chagos Islands to be resettled and/or to provide public funding for this purpose. Although the Divisional Court dismissed them, the Court of Appeal subsequently granted to leave to appeal against its decision.⁹⁷ One of the grounds on which permission to appeal was granted addressed the ramifications of the *Chagos Advisory Opinion* for the European Convention on Human Rights' (ECHR) application to the BIOT/Chagos Archipelago.⁹⁸ The key issue here is whether the approach followed by the Strasbourg Court, in its 2012 decision in *Chagos Islanders v UK* can be re-evaluated as far as the applicability of Article 56 of the ECHR to the BIOT/Chagos Archipelago is concerned.⁹⁹

Article 1 of the ECHR provides that: 'The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention'. According to the jurisprudence of the European Court of Human Rights on the issue of jurisdiction, the Convention will be engaged if a Contracting State is exercising governmental authority in a particular setting and either: (i) its agents have authority and control over an affected individual;¹⁰⁰ or (ii) it exercises effective control over the area in question.¹⁰¹ However, developments concerning the jurisdictional scope of Article 1 seem to have had no discernible impact on the interpretation of the colonial application clause contained in Article 56 (formerly Article 63). Specifically, Article 56(1) allows a Contracting State to extend the Convention to one or more of its Overseas Territories. Indeed, the operation of Article 56 has been held to be 'clearly separate and distinct' from jurisdiction exercised under Article 1.¹⁰² In recent years, the Strasbourg Court's consistent position has been that the Convention cannot apply in the absence of a positive declaration extending it to such a Territory. This differentiated approach has led to strange outcomes. For instance, in *Al Skeini v UK*,

⁹⁶ See (n 72).

⁹⁷ [2019] EWCA Civ 1254.

⁹⁸ *ibid*, [2].

⁹⁹ (2013) 56 EHRR SE15.

¹⁰⁰ *Bankovic v Belgium* (2001) 44 EHRR SE5, [71]; and *Al-Skeini v UK* (2011) 53 EHRR 18, [136-7].

¹⁰¹ *Bankovic*, *ibid* [71]; *Al-Skeini*, *ibid*, [138-139]; and *Loizidou v Turkey* (Preliminary Objections) (1995) 20 EHRR 99, [75].

¹⁰² *Al Skeini*, *ibid*, [140]; and *Chagos Islanders v UK*, (n 99), [73].

the UK's jurisdiction was held to be engaged, under Article 1, in connection with its military occupation of southern Iraq. In contrast, in *Chagos Islanders v UK*,¹⁰³ the ECHR was found to be inapplicable to the BIOT, a Territory over which the UK was assumed to exercise sovereign authority, because it had chosen not to extend the Convention there, in accordance with the terms of Article 56. This admissibility decision followed the approach the Court had devised in *Quark Fishing Company v UK*,¹⁰⁴ where it had ruled that Protocol 1 to the Convention did not apply to South Georgia and the South Sandwich Islands, a British Overseas Territory, on the basis that it had not been expressly extended to that Territory, under Article 4(1) of that Protocol.¹⁰⁵

However, in the light of the *Chagos Advisory Opinion*, Article 56 should now be treated as being inapplicable to the BIOT with the outcome that the UK's jurisdiction is engaged vis-à-vis this Territory by reference to Article 1 of the ECHR via the 'effective control of an area' test endorsed in *Al Skeini*. Such an approach may be justified by the ICJ's finding that self-determination generates *erga omnes* obligations for third States and international community more generally.¹⁰⁶ To this end, it is worth noting that Article 56(1) allows:

'Any State may at the time of its ratification or at any time thereafter declare by notification addressed to the Secretary General of the Council of Europe that the present Convention *shall*, subject to paragraph 4 of this Article, *extend to all or any of the territories for whose international relations it is responsible*.'¹⁰⁷

The key question, as far as the ECHR's application to the BIOT is concerned, is this – if the UK's continued administration of the Chagos Archipelago is unlawful as a matter of CIL, then how can the UK be treated as being responsible for the Territory's international relations, pursuant to Article 56? The *Chagos Advisory Opinion* provides the necessary authority in support of the argument that the UK is not responsible for the Territory's international relations because it does not exercise sovereign authority over the Chagos Archipelago as a matter of international law.

¹⁰³ *Chagos Islanders v UK*, *ibid*, [65-75]).

¹⁰⁴ (2007) 44 EHRR SE4.

¹⁰⁵ The terms of Art 4 of Protocol 1 are comparable to Art 56(1).

¹⁰⁶ *Chagos Opinion* (n 1), [180].

¹⁰⁷ Emphasis added.

Moreover, the Strasbourg Court itself has previously acknowledged there might be cases where the status of an Overseas Territory may be disputed as far as the applicability of Article 56 is concerned. For example, in *Quark Fishing Company v UK*, the Court stated that:

‘Since there is no dispute as to the status of South Georgia and the South Sandwich Islands as a territory for whose international relations the United Kingdom is responsible within the meaning of Article 56, the Court finds that the Convention and Protocol cannot apply unless expressly extended by declaration [...].’¹⁰⁸

The argument that Article 56 is inapplicable to the BIOT, and that any exercise of jurisdiction over the Chagos Archipelago must be governed by Article 1, is an irresistible one. This conclusion is reinforced by the terms of Article 31(3)(c) of the VCLT, which provides that treaty provisions shall be interpreted in a manner that takes into account any relevant rules of international law applicable between the parties. Consequently, the UK courts would be bound to rule on the implications of the *Chagos Advisory Opinion* for the current *Hoareau/Bancoult* appeal.¹⁰⁹ And, ultimately, the Strasbourg Court itself would be bound to give effect to the ICJ’s rulings, if required.¹¹⁰

6. Conclusion

In its *Chagos Advisory Opinion* the Court delivered surprisingly robust responses to the questions posed in the Assembly’s Request. The Opinion, and the Separate Opinions which accompanied it, have significantly elaborated on the content and scope of the customary right to self-determination in relation to situations of decolonization. While the main *Opinion* may be seen as something of a missed opportunity, as far as the consolidation of the category of *jus cogens* is concerned, several of the Separate Opinions made valuable contributions to the development of self-determination’s peremptory character. The Court also bolstered the Assembly’s

¹⁰⁸ *Quark Fishing* (n 104), [73].

¹⁰⁹ However, a UK court would have to consider the constitutional implications of CIL on this point. See *R v Margaret Jones* [2007] 1 AC 136. Moreover, it may have to rule on the validity of any attempt by the UK government to certify that the BIOT constitutes a British Overseas Territory. See *Christian v The Queen* [2007] 2 AC 400, [9-10] (Lord Hoffmann); and *The Fagernes* [1927] P 311, 324 (Atkin LJ).

¹¹⁰ Moreover, the Advisory Opinion could also be used to overcome the European Court’s finding that the Chagossians could not qualify as victims for the purpose of the Convention’s application, under Art 34, because the vast majority had settled their claims and received compensation through the 1982 Mauritius-UK Agreement: *Chagos Islanders v UK* (n 99), [81].

authority to take the lead in resolving this case. From its actions to date, the Assembly is clearly intent on bringing about Mauritius' decolonization. In this respect, the interests of Mauritius and the Chagossians are closely aligned but they are not identical. Mauritius has focused largely on securing sovereignty over the Archipelago while the Chagossians have been more concerned with the right of abode and resettlement. Although the collective suffering of the Chagossians played a crucial role in the narratives offered by participants during the advisory proceedings, greater attention needs to be paid to the protection of their rights and interests as the pressure mounts on the UK to withdraw from the Archipelago.